UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C., 20460

AUG 23 2019

MEMORANDUM

SUBJECT: Consent Agreement and Proposed Final Order: *In the Matter of Lexington Container Company*, Docket No. CAA-HQ-2018-8378

FROM: Rosemarie A. Kelley, Director
Office of Civil Enforcement
Rosemarie A Kelley

TO: Environmental Appeals Board

Attached for your ratification and issuance is a Consent Agreement and proposed Final Order ("CAFO") to settle the above-referenced enforcement action regarding violations of Section 111(e) of the Clean Air Act ("CAA" or "Act"), 42 U.S.C. § 7411(e), and regulations promulgated under Section 183(e)(3) of the Act, 42 U.S.C. § 7511b(e)(3). The CAFO is enclosed as Attachment A.

Phillip A. Brooks, Director of the Air Enforcement Division ("AED") of the Office of Civil Enforcement ("OCE") of the Office of Enforcement and Compliance Assurance ("OECA"), signed this CAFO on behalf of the United States Environmental Protection Agency ("EPA"), and Basilio Giangeruso, owner of Lexington Container Company, signed this CAFO on behalf of the Respondent. The parties have agreed to settle all causes of action before further court proceedings. Therefore, this proceeding will be concluded before filing of an answer if and when the Environmental Appeals Board ("EAB") ratifies the Consent Agreement and issues the Final Order. 40 C.F.R. §§ 22.13(b), 22.18(b)(2)–(3).

This memorandum is submitted in accordance with the EAB's Consent Agreement and Final Order Procedures (July 2018), which provide that the OCE Director or Acting Director may transmit Consent Agreements and proposed Final Orders directly to the EAB. As discussed in this memorandum, I have determined that the Consent Agreement would serve the public interest and would comport with the CAA, applicable regulations, and EPA policy. If ratified, the CAFO would assess a civil penalty of $110,000 against Respondent for the alleged violations.

Background

Governing Law

Under Section 183(e)(3) of the Act, 42 U.S.C. § 7511b(e)(3), EPA must identify and regulate categories of consumer or commercial products that account for at least 80 percent of volatile organic compound emissions from consumer or commercial products in ozone nonattainment areas. On May 16, 2006, EPA added portable fuel containers ("PFCs") to the list of products that it would regulate under Section 183(e). *See* 71 Fed. Reg. 28,320. On February 26, 2007, EPA promulgated regulations for the Control of Evaporative Emissions from New and In-Use Portable Fuel Containers. *See* 40 C.F.R. Part 59, Subpart F

("Subpart F"). Among other things, Subpart F establishes emission standards, labeling requirements, and procedures for obtaining a certificate of conformity for PFCs. EPA issues a certificate of conformity to PFC manufacturers to certify that a particular line of PFCs with similar emission characteristics conforms to the requirements of Subpart F. Subpart F, which applies to PFC manufacturers, importers, and wholesale distributors, prohibits the sale, distribution, or importation of PFCs unless they are labeled, comply with the emissions standards and other Subpart F requirements, and are covered by an EPA certificate of conformity. 40 C.F.R. § 59.602. Persons violating Subpart F are treated, for enforcement purposes, as having violated a requirement of Section 111(e) of the Act, 42 U.S.C. § 7411(e). *See* 42 U.S.C. § 7511b(e)(6).

Respondent

The Respondent to this Consent Agreement is Lexington Container Company ("Lexington"). Lexington is a sole proprietorship doing business in the Commonwealth of Kentucky. Respondent sells food grade containers, prepping supplies, survival supplies, and other items on its website, www.lexingtoncontainercompany.com.

Violations Settled by the Consent Agreement

The following facts are stipulated in the Consent Agreement: Between January 1, 2012 and June 1, 2016, Respondent imported 20-liter, 10-liter, and 5-liter PFCs from Valpro Ltd. and Swiss-Link Inc. that were not covered by a certificate of conformity issued under Subpart F. Between January 1, 2014 and June 1, 2016, Respondent sold 12,887 of those uncertified PFCs in the United States. On or about June 1, 2016, Respondent stopped offering uncertified PFCs for sale in the United States.

Civil Penalty Calculation

Any person who, after December 6, 2013, through November 2, 2015, violates a regulation promulgated under 42 U.S.C. § 7511b(e), is subject to a civil penalty of up to $37,500 per day per violation. 42 U.S.C. § 113(d)(1); 40 C.F.R. § 19.4. For violations that occurred after November 2, 2015, the per day penalty increased to $99,681 for penalties assessed judicially under 42 U.S.C. § 7413(b), and to $47,357 for penalties assessed administratively under 42 U.S.C. § 7413(d)(1).

In determining civil penalties, the CAA requires that the EPA consider "the size of the business, the economic impact of the penalty on the business, the violator's full compliance history and good faith efforts to comply, the duration of the violation as established by any credible evidence (including evidence other than the applicable test method), payment by the violator of penalties previously assessed for the same violation, the economic benefit of noncompliance and the seriousness of the violation," and "such other factors as justice may require." 42 U.S.C. § 7413(e).

Here, AED followed a penalty policy that incorporates these statutory factors and calculates civil penalties for administrative penalty cases, like this case, brought under Section 113(d) of the Act. CAA Stationary Source Civil Penalty Policy (October 25, 1991) (hereinafter "Penalty Policy"), *available at* https://www.epa.gov/sites/production/files/documents/penpol.pdf. The Penalty Policy provides for calculation of administrative civil penalties as follows. First, the Penalty Policy requires the calculation of the *preliminary deterrence amount*. This is the sum of the *economic benefit* and the *gravity* components of the penalty. The Penalty Policy allows the adjustment of the gravity component to reflect the violator's degree of willfulness or negligence, degree of cooperation or non-cooperation, and history

of noncompliance. After the preliminary deterrence amount is determined, that amount can be further adjusted to account for litigation risk.

Although the Penalty Policy applies to this case brought under Section 113(d) of the Act, some of its gravity provisions are inappropriate for violations involving the high-volume sales of low-emission consumer products like the PFCs at issue here. For certain categories of consumer products, EPA has developed CAA penalty policies that assign relatively small "per unit" penalty amounts, or a gravity multiplier based on the number of units, and thus account for the potentially large number of violations in calculating gravity. *See, e.g.*, Appendix VII of the Penalty Policy, Residential Wood Heaters Penalty Policy (Sept. 14, 1989), *available at* https://www.epa.gov/sites/production/files/documents/penpol.pdf; Clean Air Act Mobile Source Penalty Policy – Vehicle and Engine Certification Requirements (Jan. 16, 2009) (hereinafter, "Mobile Source Penalty Policy"), *available at* https://www.epa.gov/sites/production/files/documents/vehicleengine-penalty-policy_0.pdf. The Penalty Policy, in contrast, establishes large "per violation" penalty amounts. Applying the values assigned by the Penalty Policy's gravity assessment would, in this case, result in a very large penalty disproportionate to the environmental harm and out of line with EPA's approach to penalties in CAA cases involving widely-distributed consumer products.

Thus, AED has followed the Penalty Policy and applied the relevant factors to the specific facts and circumstances of this case, but has also made adjustments to the gravity factors where appropriate. In particular, as detailed below, AED has treated Respondent's conduct as a single violation for purposes of applying the gravity factors.

Preliminary Deterrence Amount

As discussed further below, the economic benefit portion of the preliminary deterrence amount is $90,079.00, and the gravity portion is $58,615.93. Thus, the preliminary deterrence amount is $148,694.93.

A. Economic Benefit

The Penalty Policy directs that, "any penalty should, at a minimum, remove any significant economic benefit resulting from non-compliance."[1] The economic benefit includes the economic benefit from delayed and avoided compliance costs, but the Penalty Policy recognizes that in some instances the economic benefit includes the profits from illegal activities.[2] The illegal importation or sale of uncertified PFCs does not involve the type of delayed or avoided costs usually associated with CAA violations at stationary sources (*e.g.*, savings from deferred costs for failure to install emission control equipment, avoided costs from failing to employ sufficient number of trained staff).[3] To the extent Respondent experienced any economic benefit from the delayed or avoided costs of importing and selling uncertified, rather than certified, PFCs, AED believes, in this case, those benefits are reflected in Respondent's profit from selling the illegal products.

Based on information that Respondent provided in response to a CAA Section 114 information request, AED determined that Respondent's total profit from the sale of uncertified PFCs, from 2014 through 2016, was $90,079.00.

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[1] Penalty Policy at 4 (emphasis in the original).
[2] *Id.* at 4-6.
[3] *Id.* at 5.

B. Gravity

The gravity component reflects the seriousness of the violation, and includes consideration of the actual or possible harm, the importance to the regulatory scheme, and the size of the violator. The Penalty Policy also allows adjustments to the gravity component based on several factors designed to promote equitable treatment and consistency. Finally, the gravity component must be adjusted for inflation.[4]

To assess the actual or possible harm, AED first considered the percent exceedance of the emission standard. The Penalty Policy specifies penalty amounts based upon a violation's percent exceedance of the relevant emission standard. AED does not have relevant information about the actual emissions from the uncertified PFCs sold by Respondent. But when promulgating Subpart F, EPA estimated that the Subpart F rules would reduce emissions compared to uncontrolled PFCs by 75%.[5] EPA tests of noncompliant PFCs have also shown emissions 16 to 67% above the Subpart F standard. Given the potential range of emissions, and the lack of information regarding the specific products that Respondent sold, AED determined that a single assessment of $10,000, which corresponds to emissions 30 to 60% above the standard,[6] is appropriate. Next, because the fuels contained in PFCs contain hazardous air pollutants, including benzene, AED assessed, consistent with the Penalty Policy, an additional $15,000 for the toxicity of the pollutants.[7] Third, the Penalty Policy specifies additional penalty amounts based on the sensitivity of the environment, which is evaluated by the nonattainment status or classification of the air quality control district where the violation occurred.[8] AED determined that, based on the broad geographic distribution of sales in this case, assessing a penalty based on the sensitivity of the environment is not appropriate. Finally, the Penalty Policy calls for consideration of the duration of the violation as part of the assessment of actual or possible harm.[9] Here, AED assessed a single $15,000 penalty specified by the Penalty Policy for a length of violation corresponding to a 7-12 month continuous violation.[10] While violations in this matter are the acts of importing and selling illegal PFCs, the excess emissions, and thus harm from the use of the PFCs continues after sale for as long as the PFCs are in use, which warrants treating this violation under the Penalty Policy as having some continuous duration after the sales transaction occurs.[11]

For the importance to the regulatory scheme element, the Penalty Policy specifies penalty amounts for different categories of violative conduct that harms the CAA's regulatory scheme.[12] Here, AED added, consistent with the Penalty Policy, a single assessment of $15,000 for failing to operate and maintain emissions controls required by the CAA because unlike certified PFCs, uncertified PFCs have made no

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[4] *See* Susan Parker Bodine, Amendments to the EPA's Civil Penalty Policies to Account for Inflation (effective January 15, 2018) and Transmittal of the 2018 Monetary Penalty Inflation Adjustment Rule (Jan. 11, 2018) (hereinafter "2018 Penalty Inflation Memo") at 3, *available at* https://www.epa.gov/sites/production/files/2018-01/documents/amendmentstotheepascivilpenaltypoliciestoaccountforinflation011518.pdf.

[5] U.S. Envtl. Prot. Agency, Final Rule, Control of Hazardous Air Pollutants from Mobile Sources, 72 Fed. Reg. 8,428, 8,499 (Feb. 26, 2007).

[6] Penalty Policy at 10.

[7] *See id* at 11.

[8] *Id.*

[9] *Id.* at 11-12.

[10] *Id.* at 12.

[11] *Id.* at 10 (explaining that the duration of violation factor addresses the concern that "the longer a violation continues uncorrected, the greater the risk of harm").

[12] *Id.* at 12-13.

demonstration that they are designed and constructed to control emissions, as required by the regulations.[13]

Finally, the Penalty Policy provides for certain additional penalty amounts to be assessed commensurate with the size of the violator.[14] AED determined that, in light of the facts in this case, assessing a size of violator component of the penalty was not necessary to achieve the deterrence goals of the penalty.

The Penalty Policy directs that several of the above factors – such as the percent exceedance of the emissions standard and the importance to the regulatory scheme – should be assessed separately for each violation. But the Title I enforcement matters usually covered by the Penalty Policy do not involve illegal sales of consumer products.[15] Because applying the Penalty Policy factors on a per violation basis would result in a penalty amount disproportionate to the seriousness of the violations in this particular case, and would not advance the deterrence objectives of the Penalty Policy, AED has treated Respondent's conduct as a single violation for the purposes of applying the gravity factors.

The sum of the gravity factor assessments described above resulted in a total gravity amount of $55,000.[16] AED developed a weighted inflation factor reflecting the fact that approximately 88% of the illegal sales occurred prior to November 2, 2015.[17] Applying this weighted inflation factor increased the gravity component to $83,737.04.[18]

The Penalty Policy provides that the gravity component may be further adjusted to reflect the degree of willfulness or negligence, history of noncompliance, environmental damage, and cooperation.[19] Respondent is not known to have any previous violations, so no adjustment was made for this factor. Moreover, Respondent demonstrated no knowledge of the applicable regulations so AED saw no need to increase the penalty for willfulness. Once Respondent was made aware of the violation, Respondent immediately ceased the violative conduct and cooperated with AED's investigation.[20] AED adjusted the gravity component downward by 30% to reflect Respondent's cooperation,[21] resulting in a final gravity component of $58,615.93. Finally, AED determined that the environmental harm caused by the violation was already sufficiently addressed by the gravity component of the penalty, and so did not think an additional assessment for environmental damage was necessary.

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[13] *Id.*

[14] *Id.* at 14-15.

[15] *Compare* Penalty Policy approach to gravity with gravity analysis in the Mobile Source Penalty Policy.

[16] ($10,000 for percent exceedance of the emission standard) + ($15,000 for toxicity of pollutants) + ($15,000 for length of violation) + ($15,000 for failing to operate and maintain emissions controls) = $55,000.

[17] Of 12,887 total illegal sales, 11,349 (88%) occurred prior to November 2015, and 1,538 (12%) occurred after November 2015. Thus, the "weighted" inflation factor gives 88% of the weight to the pre-November 2, 2015 inflation factor of 1.4853, and 12% of the weight to the post-November 2, 2015 inflation factor of 1.79523. The resulting weighted inflation factor is as follows: 0.88 x 1.4853 + 0.12 x 1.7952 = 1.52249; *see also* 2018 Penalty Inflation Memo at 3, *available at* https://www.epa.gov/sites/production/files/2018-01/documents/amendmentstotheepascivilpenaltypoliciestoaccountforinflation011518.pdf (directing that for violations occurring on or before November 2, 2015, use of multipliers listed in the December 6, 2013, inflation adjustment memorandum titled *Amendments to the U.S. Environmental Protection Agency's Civil Penalty Policies to Account for Inflation (Effective December 6, 2013)*).

[18] $55,000 x 1.52249 = $83,737.04.

[19] Penalty Policy at 15-19.

[20] *Id.* at 16 (explaining that violator's knowledge of the legal requirement may warrant raising the penalty).

[21] *Id.* at 16-17.

The economic benefit and gravity components together result in a preliminary deterrence amount of $148,694.93.

Final Penalty Amount

The Penalty Policy provides that the preliminary deterrence amount may be mitigated based on litigation risk.[22] The CAA further provides consideration of "other factors as justice may require" in assessing a penalty. 42 U.S.C. § 7413(e). This case presents several such factors that warrant an additional reduction. This is one of the first actions enforcing Subpart F against an importer of PFCs. Based on the immediate cessation of the illegal activity and having completely recovered the illegal profit from the misconduct, AED does not believe a large penalty is necessary to deter further misconduct from Respondent. To reflect these circumstances, and the litigation risk inherent in any case, AED applied a further downward adjustment of 25% to the preliminary deterrence amount, resulting in a final target penalty number of $111,521.19.

AED and Respondent negotiated a settlement penalty of $110,000. AED maintains that this amount is appropriate based on the analysis described above and the fact that every case has some inherent litigation risk.

Release

As specified in the Consent Agreement, payment of the civil penalty will resolve Respondent's civil penalty liability related to the violations alleged.

Environmental Appeals Board Jurisdiction

The Environmental Appeals Board is authorized to ratify consent orders memorializing settlements between the EPA and Respondent resulting from administrative enforcement actions under the CAA, and to issue final orders assessing penalties under the CAA. *See* EPA Delegation 7-41-C; 40 C.F.R. § 22.4(a)(1).

Human Health and Environmental Concerns Presented by Respondent's Actions

In listing PFCs as a product for regulation under Section 183(e), EPA explained that "[a]lthough an individual PFC is a relatively modest emission source, the aggregate [volatile organic compound, or "VOC"] emissions from PFC[s] are quite significant."[23] EPA calculated that PFC emissions contributed to approximately 6% of VOC emissions from consumer and commercial products in ozone nonattainment areas.[24] The source of a PFC's air pollution emissions is the fuel stored within.[25] The three main types of PFC emissions are: evaporative emissions from unsealed or open containers, permeation emissions from fuel passing through the walls of the plastic containers; and evaporative emissions from fuel spillage during use.[26]

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[22] *Id.* at 19.
[23] U.S. Envtl. Prot. Agency, Notice, Consumer and Commercial Products: Schedule for Regulation, 71 Fed. Reg. 28,320, 28,322 (May 16, 2006).
[24] *Id.* at 28,323, Table 1.
[25] Control of Hazardous Air Pollutants from Mobile Sources, 72 Fed. Reg. at 8,432 (describing hydrocarbon emissions from PFCs).
[26] Consumer and Commercial Products: Schedule for Regulation, 71 Fed Reg. at 28,322.

The environmental and human health objective of reducing VOC emissions is to reduce the formation of ozone. Ground-level ozone, a key component of smog, is formed by reactions of VOCs and nitrogen oxides in the presence of sunlight.[27] Exposure to ozone is associated with crop loss, forest and ecosystem damage, and various human health concerns.[28] Acute human health impacts include respiratory symptoms (e.g., coughing, throat irritation, difficulty breathing), increased susceptibility to respiratory infection, aggravation of asthma, and reduced cardiovascular functioning.[29] Children, the elderly, outdoor workers, and people with preexisting respiratory illnesses are particularly vulnerable to acute ozone impacts.[30] Long-term exposure to ozone may cause chronic health effects, such as structural damage to lung tissue and an accelerated decline in baseline lung function.[31]

The Subpart F standards for PFCs also result in a significant reduction of benzene and other gaseous toxics.[32] Benzene is a carcinogen that causes leukemia, and that can also cause noncancer health effects including blood disorders and immunotoxicity.[33] Children may represent a subpopulation at increased risk from benzene exposure.[34]

EPA has not conducted testing on the products that Respondent sold. However, EPA estimated that the Subpart F requirements reduce hydrocarbon emissions compared to uncontrolled PFCs by about 75%.[35] In particular, the automatically closing spouts, which Respondent's products did not have, are a "key part" of the Subpart F emission controls.[36] It is likely that the use of products sold by Respondent results in higher emissions of VOCs and benzene compared to controlled cans.

Past or Pending Actions

There are no past or pending actions involving Respondent arising out of the same or similar facts.

The CAFO Would Serve the Public Interest

This CAFO serves the public interest by promoting compliance with the CAA's prohibition against the sale of uncertified PFCs. The Consent Agreement includes a penalty that will deter Respondent, level the playing field with other sellers of certified PFCs, and generally deter others in the industry, from committing similar violations of the CAA.

EPA Delegations of Authority

Congress delegated to the EPA Administrator the authority to administratively assess civil penalties in lieu of a civil judicial action in matters "where the total penalty sought does not exceed [$378,852] and

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[27] *Id.* at 28,321.
[28] Control of Hazardous Air Pollutants from Mobile Sources, 72 Fed. Reg. at 8,442 (describing plant and ecosystem effects of ozone); Consumer and Commercial Products: Schedule for Regulation, 71 Fed. Reg. at 28,321.
[29] Control of Hazardous Air Pollutants from Mobile Sources, 72 Fed. Reg. at 8,441; Consumer and Commercial Products: Schedule for Regulation, 71 Fed. Reg. at 28,321.
[30] Control of Hazardous Air Pollutants from Mobile Sources, 72 Fed. Reg. at 8,442; Consumer and Commercial Products: Schedule for Regulation, 71 Fed. Reg. at 28,321.
[31] Consumer and Commercial Products: Schedule for Regulation, 71 Fed. Reg. at 28,321.
[32] Control of Hazardous Air Pollutants from Mobile Sources, 72 Fed. Reg. at 8,432.
[33] *Id.* at 8,435.
[34] *Id.* at 8,436.
[35] *Id.* at 8,499.
[36] *Id.* at 8,500, 8,503.

the first alleged date of violation occurred no more than 12 months prior to the initiation of the administrative action, except where the Administrator and the Attorney General jointly determine that a matter involving a larger penalty amount or longer period of violation is appropriate for administrative penalty action." 42 U.S.C. § 7413(d)(1); 40 C.F.R. § 19.4. In a letter dated July 10, 2018, the Department of Justice, through appropriately delegated officials, provided to EPA its determination that the Section 113(d) 12-month temporal limitation should be waived for this matter and that an administrative penalty action is appropriate for the period of violations.

The Administrator delegated the authority "to sign consent agreements memorializing settlements between the Agency and respondents" and to "represent the EPA in administrative proceedings conducted under the CAA and to negotiate consent agreements between the Agency and respondents resulting from such enforcement actions" to the Assistant Administrator for the Office of Enforcement and Compliance Assurance ("OECA AA"). EPA Delegation 7-6-A (Aug. 4, 1994); Delegation 7-6-B (February 4, 2016). The OECA AA redelegated these authorities to the Division Director level. Office of Enforcement and Compliance Assurance Redelegation 7-6-A (Sept. 2015); Office of Enforcement and Compliance Assurance Redelegation 7-6-B (Sept. 2015); Office of Civil Enforcement Redelegation 7-6-A (Sept. 2015); Office of Civil Enforcement Redelegation 7-6-B (Sept. 2015). Thus, Phillip A. Brooks, Director of the AED, is authorized to sign the Consent Agreement on the EPA's behalf.

Recommendation

I respectfully recommend that you ratify the Consent Agreement and issue the proposed Final Order. Please direct any questions to Phillip A. Brooks at (202) 564-0652 or Providence Spina at (202) 564-2722.

Attachments: Consent Agreement and Proposed Final Order

cc: Gary Rubin, Esq., Counsel for Lexington Container Company